No. 95-1158

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RONALD C. BROWN, SUZANNE M. BROWN, JASON P. MESITI, by next friends Ronald C. Brown and Suzanne M. Brown, *et al.*,

Petitioners,

v.

HOT, SEXY AND SAFER PRODUCTIONS, INC., SUZANNE LANDOLPHI, THE CHELMSFORD SCHOOL COMMITTEE, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In their Opposition to Petition for Writ of Certiorari ("*Opp.*"), Respondent school officials contend that they did nothing wrong, that they only did it once, and that they would not do it again. In reality, they have already done it again. *See* Section III, *infra.*

Petitioners' constitutionally protected rights should not be dependent on the largesse of government officials who use their authority to circumvent their own policies.

The so-called "mandatory opt-out policy" did not prevent the school committee and the highest-ranking officials in the school from forcing every student to attend the Hot, Sexy and Safer performance. There is nothing to prevent these officials from circumventing their own policy again, whenever it suits them.

This case raises claims involving the fundamental rights of parents to direct the upbringing and education of their children. Yet the lower courts decided the case without even the benefit of a trial. For this Court to ratify the cavalier way in which the lower courts dismissed Petitioners' Amended Complaint would empty of meaning the long line of precedents recognizing and protecting these fundamental rights of parents.

I. Important Questions of Federal Law, Potential for Repetition, and Conflict with Supreme Court Precedent

Respondent school officials present a distorted characterization of their conduct, and of the Hot, Sexy and Safer performance. Their Opposition echoes the misinformation which the school officials dictated to Petitioner students in the profane and sexually explicit exhibition which advocated that students engage in premarital heterosexual and homosexual

conduct.[1] In contrast, Petitioners have provided an Appendix containing a transcript of the entire Hot, Sexy and Safer performance. This Court is urged to review the Hot, Sexy and Safer transcript in its entirety, in order to discern the true context of the forced presentation and its intended effect on adolescents who are at that vulnerable age when attitudes toward sexual morality are formed. (*See Pet.*, Appendix D).

The Hot, Sexy and Safer performer told the students: " 'Hey, I'll take your brother or your sister. It doesn't matter to me. I don't care.' (Giggle) 'Alright? So, that's a bi-sexual, alright?' " *Pet.* at D-19. During one of her "experiments" involving breast size and suction noises made by sweaty bodies, the performer wagered that " 'when two women are together they make huge noises, right?' (Giggle) . . . 'And when two guys are together, they'll make little noises.' " *Pet.* at D-32. Respondent performer instructed the students that "most young men will experience their first orgasm with another guy." *Pet.* at D-46. The students were forced to watch as a male student knelt down before them, while licking Respondent performer's condom in simulation of oral sex. *Pet.* at D-59, 60.

Respondents are arrogantly mistaken in their argument that this Court's precedents justify their coercive conduct. In their Opposition they suggest that by forcing attendance at such a performance high school students can "learn to endure offensive speech and to counter it." *Opp.* at 4, n.3. Petitioners submit that this is nothing more than a self-serving misinterpretation of precedent.

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[1] For example, the students were told that there are thousands of ways to "sexually satisfy myself and my partner without intercourse." *Pet.* at D-46. The performer's instruction on "communication" during sexual intercourse was based on a long and degrading discussion of excretory functions. *Pet.* at D-31.

Respondent school officials maintain that the longstanding Constitutional protections regarding indecency and explicit sexual conduct do not apply to the hours a minor child spends under the authority of public school officials. Respondent school officials intimate that Supreme Court precedent has vested them with discretion to decide whether to "insulate" students from performances such as Hot, Sexy and Safer or alternatively, to force the students to endure such performances. *Opp.* at 6, 7.

Petitioners submit that it would be unconscionable for this Court to uphold a ruling which shields the school committee and its highest ranking officials and administrators from accountability for forcing a profane and sexually explicit performance on a captive and unsuspecting audience of students, while at the same time maintaining that students themselves may be disciplined for uttering sexually explicit innuendo. Respondent school officials are asking for license, as well as judicial endorsement of a double standard: The bigger you are, the softer you fall.

The balance of interests between parents and public school officials has been completely disrupted by the opinions of the lower Federal courts which have ruled on the instant case. When parent Petitioners sought to protect their children from profanity and degrading portrayals of sexual and excretory functions, the lower courts dismissed their claims as seeking "to restrict the flow of information in the public schools." *Pet.* at C-13. The Court of Appeals decision also made a point of casting doubt on Supreme Court precedent which established the fundamental nature of the parental right to direct the upbringing and education of their children. *Pet.* at C-12. Further, the appellate court's decision suggested that public school officials in the United States need not concern themselves with the Free Exercise Clause of the Constitution,

as long as they label their official actions (no matter how shocking) as "curricula" activities. *Pet.* at C-21, n.11.

The arrogance of Respondent school officials remains unchecked, and the decisions of the lower courts reinforce their view that public schools in America are enclaves of authority where parents and students have no remedy or redress for deprivations of federal civil rights.

II. Concerted Violation of Petitioners' Procedural Due Process Rights

By promulgating its policy on "health education continuum," the Chelmsford School Committee acknowledged the parents' right to direct their childrens' upbringing and education regarding human sexuality.

There is a "rich variety of ways in which the power of government is distributed among a host of different officials and official bodies," and "[p]olicymaking responsibility is shared among more than one official or body." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25, 126 (1988).

The group of school officials named as defendants in this case had the power to plan the profane and sexually explicit performance for weeks and months in advance, and the power to force students to attend Hot, Sexy and Safer, without giving notice to parents or obtaining the required consent.

How these school officials distributed, delegated and shared their powers, and whether and how they decided their performance did not fall under the purview of the "health education continuum" has never been explained, and therefore is most certainly capable of repetition.[2]

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[2] An after-the-fact Memorandum dated April 9, 1992 indicates that Respondent school superintendent Moser did have the power to make policy, to direct the school principal regarding forced attendance of

There are "numberless factual scenarios that may come to light in litigation," including local ordinances and regulations such as the policy at issue in this case. *Praprotnik*, 485 U.S. at 125. The factual scenario offered by Respondents school committee and school officials is that all of them were unauthorized to plan and carry out the Hot, Sexy and Safer performance. *Opp.* at 8, 9, 10, citing *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984). Respondents claim that their coercive conduct constituted a "random and unauthorized act." Their reasoning, like that of the lower courts, is flawed.

Respondents school committee and school officials suggest that *Zinermon v. Burch*, 494 U.S. 113 (1990), stands merely for the proposition that *Parratt-Hudson* is triggered when "the state [chooses] to give state officials 'broad power' and uncircumscribed discretion." *Opp.* at 9. However, *Zinermon* stands for a much broader principle. Respondents' conduct comes within the parameters of *Zinermon* because "[t]he State delegated to them the power and authority to effect the very deprivation complained of here, . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against" the unlawful conduct. *Zinermon*, 494 U.S. at 138. The lower courts misapplied the holding in *Zinermon*.

In their efforts to reconcile the Court of Appeals opinion in the instant case, Respondents argue that "two other courts of appeals have concluded that even the involvement of a policymaking official in the state's failure to follow its own procedures does not take a due process claim outside the

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students at sexually explicit assemblies, and to determine whether such assemblies came under the "health education continuum." Amended Complaint Ex. D at 2. The Memorandum raises factual questions, including whether Respondents had previously deemed the Hot, Sexy and Safer performance outside the continuum.

Parratt-Hudson rule." *Opp.* at 9-10, citing *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Johnson v. Louisiana Dept. of Agriculture*, 18 F.3d 318, 321-22 (5th Cir. 1994).

Respondents' argument is misleading. In *Easter House*, the power to effectuate a due process deprivation, and the responsibility for preventing such deprivation, was vested in two separate entities. *Easter House*, 910 F.2d at 1402. In the instant case, and in *Zinermon*, a single entity was responsible to establish and enforce the procedural scheme, and a single entity violated the Petitioners' rights to procedural due process. Respondents easily understood that an "erroneous deprivation [would] occur . . . at a specific, predictable point," (*Zinermon*, 494 U.S. at 136), and they withheld notice of the Hot, Sexy and Safer performance from parents. This Court should not allow Respondents to "escape liability by invoking *Parratt* and *Hudson*." *Zinermon* at 135.[3]

Petitioners have stated a claim which is exactly the type of foreseeable violation of due process which this Court in *Zinermon* sought to remove from the *Parratt-Hudson* exception.

The truth about Respondents' actions in respect of the performance at Chelmsford High School remains undisclosed, and in the control of Respondent school officials. They never answered the Amended Complaint, and the case was

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[3] Even in a pre-*Zinermon* case, it was held that "the single act of a sufficiently high-ranking policymaker may equate with or be deemed established state procedure." *Matthiessen v. Board of Education*, 857 F.2d 404, 407 n.3 (7th Cir. 1988). The Court of Appeals recognized that conduct of high ranking policymakers may be considered officially authorized action, even though a school board's "alleged action was not pursuant to the School Code, but in contravention of it, and thus would *seem* not to be pursuant to established state procedure." *Id.* (emphasis added).

dismissed before light could be shed on the extent and nature of the authority which was used to deprive Petitioners of procedural due process.[4]

Petitioners did, in fact, allege in their Amended Complaint that each Respondent was responsible for official policy making and for the Constitutional deprivations suffered by Petitioners. Amended Complaint at ¶¶ 38, 48. Petitioners alleged that the individual school officials had the power and discretion to authorize an assembly, hire a performer, define the topic, require mandatory attendance by all students, and to withhold disclosure and warning to parents in violation of their rights to procedural due process.

Respondents had authority over the very interpretation of the school committee policy, and whether Hot, Sexy and Safer was even considered a "curricular offering on health." Respondent school committee itself may be held liable if Petitioners prove that the Committee had delegated final decision-making authority regarding the so-called "continuum" to the school superintendent, school principal, or other school officials named as defendants. *Howlett by and through Howlett v. Rose*, 496 U.S. 356, 359 n.2 (1990)

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[4] It is striking that Respondents quote the District Court's conclusion that Petitioners made " 'no allegation that any one of [the school committee members], or all three acting together, were authorized to circumvent a policy adopted and enacted by the committee as a whole.' " *Opp.* at 9, quoting District Court, *Pet.* at A-14. There are five members of the school committee. Three constitute a majority, authorized under state law to set school policy. Mass. Gen. Laws ch. 71, § 37 (1995). *See Pet.* at 15-16. The notion that members of the school committee were not authorized to disregard a policy they themselves established is preposterous. To dismiss the case on so technical a pleading requirement does not construe the Amended Complaint so " 'as to do substantial justice.' " *Conley v. Gibson*, 355 U.S. 41, 48 (1957), quoting Fed. R. Civ. P. 8(f).

(reinstating former high school student's § 1983 claim against school district).

Whether Respondent school committee officially sanctioned or ordered the Hot, Sexy and Safer performance, or delegated final policymaking authority regarding sexually explicit assemblies to Respondent officials, is a question of state law which the trial court must decide in light of all the facts of the case. *Praprotnik*, 485 U.S. at 123, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-83 (1986).

The trial court in the instant case failed to examine the true extent and nature of Respondent public officials' authority, as it is required to do in a case involving Constitutional deprivations by public officials, including violations of procedural due process. *Praprotnik*, 485 U.S. at 125-26. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir. 1995) (plaintiff is entitled to show that an official's conduct was a deliberate policy choice, or that an official policymaker delegated authority to a subordinate).

III. Remedies

Respondent school officials arrogantly state that "[e]ven if the staging of the mandatory assembly warranted corrective action, the prompt response of school officials the very next day supplied a remedy." *Opp.* at 4 n.3. The "remedy" is apparently the after-the-fact memorandum discussed above (*see* note 2).

However, the after-the-fact memorandum of Respondent Moser does not justify dismissal of the instant case. *See* note 2, *supra*. There was no prompt response by school officials to their concerted violations of federally protected rights. Respondent school officials planned the performance, and withheld disclosure from parents for weeks, or even months. They attended and supervised the forced attendance of students at two performances of Hot, Sexy and Safer.

Amended Complaint, ¶¶ 2, 38, 46-49. Rather than curtail the forced attendance of Petitioner students at the ninety-minute performance, Respondent school officials supervised a repeat performance, again with forced attendance. Amended Complaint ¶¶ 25-27.

Further, and significantly, Respondent school officials destroyed video tapes of both performances after their conduct became known in the community. Amended Complaint ¶ 33. The reality is, therefore, that Respondent officials' concerted and continuing course of conduct, in disregarding the rights of students and parents, demonstrates the likelihood for repetition.

Respondents' arrogant assertions of their supremacy in matters of constitutional decision-making, their blatant disregard of their responsibilities, and their refusal to accept accountability in regard to their actions, poses a significant risk of repetition should the decisions of the lower courts in the instant case be allowed to stand.

Declaratory relief is not only justified by the facts in the instant case, it is appropriate. Further, the decisions and conduct of Respondent school officials embody a policy choice for which Respondent school committee may be liable in damages. Petitioners' emotional distress is compensable under § 1983. *Carey v. Piphus*, 435 U.S. 247, 262 (1978).

In light of the inability of Respondents to carry out their duties without grossly distorting the constitutional protections afforded Petitioners and the policies promulgated by Respondent officials, the need for plenary review by this Court is indisputable.

Respectfully submitted,

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